FILED
JUN 19 1956

No. 180

IN THE

Supreme Court of the United States

October Term, 1955

FRED M. FORD, *Petitioner*,

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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To The United States Court of Appeals For The Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 19, 1956. A motion for rehearing duly filed was overruled on May 22, 1956.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is Appendix B and is a part hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1956. Order of the Court of Appeals denying a petition for rehearing was entered May 22, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Para. 1254 (1) and Rule 19.1 (6) Supreme Court Rules United States Code Annotated.

Question Presented

Urged as Reason for Granting the Petition

No computation of Income Tax liability can be made in a net worth or expenditures prosecution under Title 26 U.S.C. Para. 145 (b) absent a compliance by the Commissioner of Internal Revenue with Title 26 U.S.C. Para. 272 (a) (1), Para. 3612 (f), or by action of the Collector of Internal Revenue under 26 U.S.C. Para. 3612 (a). (Para. and Section citations are prior to 1954 Act).

To Be Urged If Petition Granted

That before the net worth method of proof may be used to convict a defendant under Title 26 U.S.C. Para. 145 (b) the Government must first prove a determination of the tax due by the defendant by the Commissioner of Internal Revenue under Title 26 U.S.C. Para. 272 (a) (1) and Title 26 U.S.C. Para. 3612 (f) or a determination of the tax due by the Collector under Title 26 U.S.C. 3612 (a). (Para. and section citations are prior to 1954 Act).

Constitutional Provisions and Statutes Involved

Constitution of the United States Amendment Five and Six. The statutory provisions are Title 26 U.S.C. Para. 145

(b), Para. 272(a)(1), Para. 3612(a), Para. 3612(f), Para. 3647, and Para. 3740. (Para. and section citations are prior to 1954 Act). They are printed in Appendix A.

STATEMENT OF THE CASE

An indictment in three counts, all laid under Title 26 U.S.C. Para. 145(b), charged that petitioner had wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him and his wife for the years 1945, 1946 and 1947 by filing false and fraudulent returns on behalf of himself and his wife wherein he reported income for a less sum than the *true amount*, and in which he stated the tax for smaller amounts than he knew to be owing. Each count *stated an amount* alleged to be the *correct amount* due for each of the three years.

The prosecution was based on the net worth method of proof.

Upon the introduction of such form of proof objection was made to it on the ground that before such method of proof may be used to convict a defendant under Title 26 U.S.C. Para. 145(b) the Government must first prove a determination of the tax due by the defendant by the Commissioner of Internal Revenue under Title 26 U.S.C. Para. 272(a)(1) and Title 26 U.S.C. Para. 3612(f) or a determination of the tax due by the Collector under Title 26 U.S.C. 3612(a). (Para. and section citations are prior to 1954 Act).

The point was reurged in petitioner's (Defendant below) Motion for Acquittal.

No proof was introduced in the District Court other than the usual net worth method of proof and no evidence of a determination by the Commissioner of Internal Revenue

of the amount of tax due was introduced nor any showing that the Collector of Internal Revenue had filed a substitute return.

The petitioner was convicted. The Circuit Court affrmed. (See opinion Appendix B).

Reason for Granting the Writ

The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court.

Prior to *Holland v. United States of America,* 348 U.S. 121, it had been urged, in net worth cases, that unless there had been a compliance by the Commissioner of Internal Revenue with Para. 41 of Title 26 U.S.C. that such net worth system of proof in criminal income tax cases was not admissible. In *Holland* the Court held that Para. 41 "refers to methods such as the cash receipts or the accrual method, * * * ". The effect of Para. 272 and 3612 of Title 26 U.S.C. has not been decided by the Supreme Court.

The indictment in this case is laid under Para. 145 (b) of Title 26 U.S.C. which provides as follows:

> "Any person required under *this chapter* to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or *truthfully account for* and pay over *such tax,* and any person who willfully attempts in any manner to evade or *defeat any tax imposed* by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000.00, or be imprisoned for not more than five years, or both, together with the costs of prosecution."

The court will note that the Gravamen of this offense is the defeating of *"any tax imposed by this Chapter * * *."* Para. 145(b) of Title 26 U.S.C. is in Chapter 1 of the Code, and Para. 11 and 12 of Title 26 U.S.C., the paragraphs imposing the tax, are in the same Chapter.

It would therefore seem that before the Government may be permitted to use the net worth method of Proof predicate should be laid that there has been a determination of the *tax imposed by this chapter.* This determination may be made by the Collector of Internal Revenue under Para. 3612(a) U.S.C., Title 26, which is as follows:

> "Authority of Collector. If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, *willfully or otherwise, a false or fraudulent return or list, from his own knowledge* and from such information as he can obtain through testimony or otherwise. * * * ",

or by the Commissioner of Internal Revenue under Para. 3612(f), Title 26 U.S.C., or Para. 272 of the same Title, each of which are set out in Appendix A. It is not contended under Para. 272 that there should be an assessment, simply the determination.

A prosecution for income tax fraud involves an alleged evasion of the civil tax liability. The defendant is charged with paying less than was required of him. What he was required to pay was a civil liability. Accordingly, it would seem essential to establish the amount of such civil liability. That civil liability can only be the dollar amount of Tax due and owing under a correct application of the law to the facts disclosed in a particular case. *(United States v.*

Philadelphia and R. Co., 123 U.S. 113, 31 L. Ed. 138). It is not the amount reported by the taxpayer, and it is not the amount determined by an expert. It is not even necessarily the amount determined by the Commissioner; but since Commissioner's determination is prima facie correct and is not reviewable by any other agent of the United States, his determination is competent evidence of the amount of the civil liability. The Courts do not have jurisdiction independently to determine the tax. They review the Commissioner's determination after a refund claim has been filed. The Tax Court reviews the Commissioner's deficiency letter. To permit a jury to determine the tax liability without the guidance of the Commissioner's determination is utterly inconsistent with all the safeguards provided by Congress for arriving at the true tax.

Under the statute an official determination is required to be made by the Commissioner in the form of a deficiency letter. Under Para. 3647, Title 26, U.S.C., the Commissioner can delegate this authority, but no subordinate can act unless he has been so delegated. Para. 3612, U.S.C., Title 26, further indicates the need for action by the Commissioner. The testimony of an expert, even though he be a Revenue Agent is merely a private opinion of what the civil liability is and Congress has not undertaken to punish anyone for reporting a smaller tax than some expert believes to be due.

There is no predicate anywhere in the evidence in this case, laid by the prosecution, of a determination of the tax due and owing by the Commissioner or Collector before embarking on its net worth proof.

The *Capone* case, 51 Fed. 2d 609, makes the following statement:

"Appellant's strongest contention in respect to this assignment of error was that the tax was not assessed or determined to the knowledge of appellant; neither was there any demand made upon him for its payment. While there was some confusion due to the fact that the Collector made an assessment as did the Commissioner of Internal Revenue, we think the evidence clearly established, not only the levy and assessment of the tax, but that notice was given to the appellant, and that payment was demanded. It is difficult to reconcile appellant's alleged ignorance to the existence of the tax with his offer of compromise. Likewise his assertion of innocence respecting the amount due, or that the Government was making a demand therefor is disputed by the proof that a destraint warrant was issued and would have been served upon him had he and his attorney not gone to the Collector's office and thereafter made a second offer of compromise somewhat larger than the first."

"Moreover this was not a deficiency tax. A deficiency tax is defined by Section 1047, Title 26 U.S.C. As is was not a deficiency tax, the notice of its assessment and demand for its payment were not required."

What the Court must bear in mind is that the position the Petitioner is taking in this case is that the statutory determination required by law as to the amount of the tax due must be made by the Commissioner in Criminal cases, because the offense is to "willfully attempt in any manner to evade or defeat any tax imposed by this Chapter. * * * " And until such tax has been determined by Commissioner under the statutes referred to no net worth proof is admissible.

Unless Para. 145(b) U.S.C. provides punishment for evasion of something definite, the statute would contain no standard and would be open to serious constitutional ob-

jections. The practice of calling Revenue Agents as experts gives their testimony an apparent official status which it does not have. Unfortunately, judges and jurors appear to give such testimony more weight than it is entitled to. It would, therefore, seem to be that the only way a net worth case can be prosecuted is for the Commissioner to determine the tax liability purportedly evaded and to confirm such tax liability and make same definite in order to bring into play Para. 145(b) of Title 26 U.S.C.

Once that is done the Government can bring in any and all proof of any kind or character to demonstrate that the taxpayer has not properly reported his income.

The net worth method of proof "is used in run-of-the-mine cases, regardless of the amount of tax deficiency involved." *Holland v. United States.* The method of proof is therefore of interest to all taxpayers. The Supreme Court in the *Holland* case had actual notice and took judicial notice of the wide spread use of the net worth theory of proof. The safeguards provided by Congress should be implemented before subjecting the millions of taxpayers to this hazardous form of proof.

The actual effect of the Circuit Court's decision in this case is to eliminate the words "tax imposed by this chapter" from Para. 145(b) of Title 26 U.S.C. Therefore, the practical effect of the decision is to eliminate all the safeguards of the chapter.

The consequence of the decision is to vest in hundreds of Revenue agents the power to determine the amount of tax imposed by the Chapter the determination of which was so carefully placed by Congress in the Commissioner or the Collector of Internal Revenue. The protection of the taxpayer in "run-of-the-mine cases" must be had.

Conclusion

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLAS W. MCGREGOR
2331 Gulf Building
Houston 2, Texas

Date: June 18, 1956.

APPENDIX A

Title 26 USC Para. 145(b) (Applicable Sec. before 1954 Act)

Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, *together with the costs of prosecution.*

Title 26 USC Para. 272(a)(1) (Applicable Sec. before 1954 Act)

Petition to Board of Tax Appeals. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this Chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of sec-

tion 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

Title 26 USC Para. 3612(a) (Applicable Sec. before 1954 Act)

Authority of collector. If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

Title 26 USC Para. 3612(f) (Applicable Sec. before 1954 Act)

Determination and assessment. The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this Section. 53 Stat. 437.

Title 26 USC Para. 3647 (Applicable Sec. before 1954 Act)

Delegation of assessment authority. The Commissioner, under regulations approved by the Secretary, is authorized to dele-

gate to any officer or employee of the Bureau of Internal Revenue, including the field service, any authority, duty, or function which the Commissioner is authorized or required to exercise or perform under Section 3640, 3641, or 3642. Added Aug. 27, 1949, C. 517, Para. 8, 63 Stat. 668.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX B
(Opinion of the Court Below)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15672

FRED M. FORD, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Western District of Texas

(April 19, 1956)

Before BORAH, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: An indictment in three counts charged that appellant had wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him and his wife for the years 1945, 1946 and 1947 by filing false and fraudulent returns on behalf of himself and his wife wherein he reported income for a less sum than the true amount, and in which he stated the tax for smaller amounts than he knew to be owing. The counts were in substantially the same form. A separate count set forth the amounts of income and tax for each of three years. The indictment alleged violations of the portion of the Internal Revenue Code of 1939 which provided that:

> " * * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." Internal Revenue Code of 1939, Former 26 U.S.C.A. Para. 145(b); Internal Revenue Code of 1954, 26 U.S.C.A. Para. 7201.

This is an appeal from a conviction and sentence following a second trial of this case held at Austin, Texas. This court reversed a conviction obtained at the first trial. *Ford v. United States*, 5th Cir. 1954, 210 F. 2d 313. At the second trial, as at the first, the Government relied upon the cash receipts and expenditures method, sometimes called the net worth method, of establishing unreported income. In the first appeal, as in the present appeal, the appellant contended that the District Court should have granted a motion for acquittal because of the insufficiency of the evidence. After relating in some detail the evidence adduced at the former trial it was held by this Court that the motion for acquittal was properly denied. The evidence in the record now before us presents proof no less convincing, and without setting forth the evidentiary facts, we hold, as we held before, that the motion for acquittal was properly denied.

The appellant contends that error was committed in denying his motion for acquittal because there had been no determination of his tax liability by the Commissioner under Para. 272 or Para. 3612 of the Internal Revenue Code of 1939. Para. 272 of the Internal Revenue Code of 1939, former 26 U.S.C.A., provides for the procedure in determining the correctness of a tax deficiency proposed by the Commissioner of Internal Revenue, including the issuance of the familiar ninety day letter. Para. 3612 authorizes the

Collector to make a return where no return or a false or fraudulent return has been filed, and requires that the Commissioner (of Internal Revenue) shall determine and assess all taxes, other than stamp taxes, as to which returns are made pursuant to the section. Whatever bearing the appellant's contention might have in a proceeding for the collection of a tax, it has no application in a criminal prosecution for attempting to evade and defeat a tax by filing false and fraudulent returns. As this Court has heretofore said:

> "A prosecution for income tax evasion is not an effort by the Government to compute income tax at all. It is an effort by the Government to prove that the taxpayer failed to compute it honestly. There is nothing in this Section (Former 26 U.S.C.A. Para. 41) nor in any other applicable statute that restricts the Government in the method of proving this fact if it exists." *Dupree v. United States*, 5th Cir. 1955, 218 F. 2d 781.

At the first trial of this case, Margaret Lera testified as a witness for the Government. She testified as a witness for the Government at the second trial. On the first trial this witness testified to the making of pay-offs to the police department of Galveston. There was no testimony in the first trial that the appellant received any of the moneys. We held, on the former appeal, that the admission of the testimony of this witness was erroneous and highly prejudicial. For this error, and another which we need not here mention, a new trial was granted. At the second trial the witness testified that she sent pay-off money to the appellant during the years 1945, 1946 and 1947 by detectives. Being interrogated about conversations between the appellant and herself during these years, she stated that she had asked appellant if the detectives had been delivering what she had been sending, and quoted his reply as being "yes, that everything was all right". This, we think, was enough

to meet the objection which was found to be error on the former appeal. It was shown that Mrs. Lera had made a settlement after the first conviction of the appellant of her own income tax liability. On cross-examination she told of being interviewed by Government agents about a month before the trial, being furnished with a transcript of the questions and answers comprising the interview, and of burning the transcript of the testimony during the noon recess of the day she testified. The owing and settlement of income taxes, the discussion with Government agents regarding some matter, possibly the Ford case, and the destruction of the transcript of the interview are not matters which would exclude Mrs. Lera's testimony.

The District Court admitted testimony as to expenditures made by appellant's wife and error is assigned because such testimony was received. There was evidence that such funds as Mrs. Ford had and spent were received from the appellant. The Court declined to give a charge to the jury, requested by appellant, that it should give no consideration to purchases of Mrs. Ford in determining the taxable income of the appellant. We need not discuss these questions as they are disposed of in the former appeal. *Ford v. United States, supra.* See *Lloyd v. United States,* 5th Cir. 1955, 226 F. 2d 9.

Relying chiefly upon *Calderon v. United States,* 9th Cir. 1953, 207 F. 2d 377, the appellant urges that the unsworn statements made by appellant to Government agents were inadmissible because, he says, the corpus delicti had not been established. The agents testified that appellant had said, in response to questions, that he kept cash in a chifforobe drawer in the amount of two or three thousand dollars in 1945 and 1947. Again he said, that in 1944, prior to the tax years involved, he had $12,000 in cash in the chifforobe drawer. Where the net worth doctrine is relied upon in a

criminal prosecution of a tax evasion case, the taxpayer's opening net worth cannot be established by his uncorroborated extra-judicial statement. *Smith v. United States,* 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192; *United States v. Calderon,* 348 U.S. 160, 75 S. Ct. 186, 99 L. Ed. 202. In the case before us the Government did not rely upon but rather rejected the statements of the appellant Ford as to the cash in the drawer. When the extra-judicial statements are disbelieved and are not relied upon by the Government it can hardly be error or its part that it produced no corroborative evidence.

The appellant urges that the indictment upon which he was convicted was void because the only witness who appeared before the Grand Jury was a Government agent who had no personal knowledge of the facts, that his testimony was based upon hearsay and hence incompetent. The Supreme Court of the United States has considered the question and given an answer adverse to appellant's contention. In the *causa celebre* of Frank Costello a conviction was had of income tax evasion upon proof of increases of net worth. The only witnesses before the Grand Jury which returned the indictment were Government agents who had no first-hand knowledge. The Supreme Court, in an opinion rendered March 5, 1956, held the indictment valid and said:

> "In Holt v. United States, 218 U.S. 245, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused.' The Court refused to hold that such an indictment should be quashed, pointing out that the abuses of criminal practice would be enhanced if indictments could be upset on such a ground.' 218 U.S. at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay.' If indictments were to be held

open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawer by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

"Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Costello v. United States*, U.S. , S. Ct. , 111 L. Ed. 24 L.W. 4128.

The appellant also contends that because the only witness before the Grand Jury did not compute taxes there could not have been any evidence before the Grand Jury from which an indictment could have been found as to the amount of tax, if any, due by appellant. To this there are two answers; first, there was no indictment sought or returned with respect to the amount of appellant's unpaid tax; and second, the holding in *Costello, supra,* is contra to the position we are asked to take.

The Government introduced as one of its witnesses, George Roy Clough, the Mayor of Galveston at the time of the trial, who testified that the reputation of appellant for being a peaceable and law-abiding citizen during the years in question was bad. On cross-examination questions were asked and answers elicited showing or tending to show the bias of the witness against the appellant. Counsel for the appellant then proposed to show by the witness that as a candidate for Mayor he had advocated open houses of prostitution. The court sustained objections to this line of questioning. Claiming this was error, the appellant tries to come within the rule announced in *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218 75 L. Ed. 624. The trial court had, in the *Alford* case, declined to permit counsel for the defendant to show that a Government witness was, at the time of the trial, in custody of Federal authorities. The Supreme Court reversed saying that "Cross-examination of a witness is a matter of right", and that:

> "Its purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood (citing cases) that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (citing cases); and that facts may be brought out tending to discredit the witness by showing that this testimony in chief was untrue or biased (citing cases).
>
> "* * * Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Alford v. United States*, 282 U.S. 687, 75 L. Ed. 624 51 S. Ct. 218.

The extent of the scope of cross-examination is largely within the discretion of the trial court and its ruling will

not be reversed absent an abuse of discretion. A wide latitude is allowed in order to show hostility, bias, prejudice, or interest, or to discredit the knowledge or veracity of the witness. *Wharton's Criminal Evidence*, 12th ed Vol. III, p. 266, et seq. Para. 871 et seq.; *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 470, 86 L. Ed. 680. The views of the witness as to the desirability of open houses of prostitution would not tend to show any bias of the witness against the appellant or that the witness was unworthy of belief. The rejected testimony was not relevant and was properly excluded.

At the beginning of the trial the court instructed the jury in these words:

> "Gentlemen of the Jury, during the trial of this case you will be permitted to separate, but you must not discuss the facts of this case with anyone, nor permit anyone to discuss the facts in your presence or hearing. Don't read any stories in the newspapers about the case."

While in Austin waiting to be called as a witness in this case, Mayor Clough was interview by a newspaper reporter. The press report of this interview quoted the Galveston mayor as saying that he had the greatest admiration for the lowest prostitute when compared to his contempt for city officials who accept her money for permission to operate. The newspaper item gave other views of the Mayor about prostitution, gambling and liquor. This story appearing in the morning of the last day of the trial (the verdict was returned the following morning), was headlined "I Believe: 'Live and Let Live.' Galveston's George R. Clough. Galveston Haven—Clough Promises Prostitutes Home." The appellant's counsel made a motion to interrogate the jury as to whether they had read the article for the stated purpose of determining whether any of the jury may have been

prejudiced by the article. The Court overruled the motion and its action is specified by the appellant as an error. The published article was a rather sensational report of a rather extended interview, but the only portions which could be said to have any direct influence upon the mind of a juror were the statement that the witness Clough had the greatest admiration for the lowest prostitute when compared to his own contempt for city officials who accept money for permission to operate, and his reference to unscrupulous politicians and pay-offs as the curse of America. The rest of the article related to the Mayor's views regarding the toleration of prostitution. In urging that the District Court erred, the appellant quotes from *American Jurisprudence* as follows:

> "It is improper for jurors to read newspaper accounts of the progress of a trial or relating to the case on trial. But a new trial should not be granted by a trial court because thereof unless the facts are such that it cannot determine with reasonable certainty whether the result was effected. Nor is a verdict vitiated by the finding of a newspaper in the jury room where the jury had no knowledge of its contents." 53 *Am. Jur.* 644, Trial Para. 895

In the pocket supplement to the above-cited volume the editors have made an addition to the foregoing text in these words:

> "It is within the discretion of the trial Court as to whether, after impanelment, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial." 1955 Cum. Supp. Vol. 53, *Am. Jur.* p. 40. See Annotation 15 A.L.R. 2d 1152.

This Court, considering a similar question, in a case where the Government had been permitted to impeach its own witness and the press reported upon the impeachment and the subsequent arrest of the witness for perjury, said:

> "On the day following impeachment of the witness Diaz, appellant presented to the court a written motion for a mistrial, to which was attached the front page of an El Paso morning newspaper containing an account of the arrest of Diaz for perjury in denying receipt of the stolen property from appellant. Appellant orally informed the Court that similar accounts had been broadcast over the El Paso radio stations. The court overruled this motion, and denied a request by appellant that the jurors be interrogated relative to their knowledge of the radio and newspaper reports in connection with the case, and further instructed them, in case such reports had already reached the jury, that they should not be considered for any purpose." *Apodac v. United States*, 5th Cir. 1953, 200 F. 2d 775.

The appellant does not complain that no further instruction was given the jury, and of course would not be heard in the making of such a complaint as no instruction was requested. The refusal to permit interrogation of the jury regarding the newspaper article was not error.

Other questions raised are without merit and do not require discussion. The judgment before us on appeal is AFFIRMED.

A TRUE COPY:

TESTE

/s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX C

JUDGMENT

Extract from the Minutes of April 19, 1956.

No. 15672

FRED M. FORD,
VERSUS
UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby denied.

* * *

I, Douglas W. McGregor, attorney for Petitioner, Fred M. Ford, hereby certify that on the 18th day of June, 1956, I served copies of the foregoing Petition for Certiorari on the United States by mailing a copy thereof in a duly addressed envelope to Honorable Russell B. Wine, United States District Attorney for the Western District of Texas, Post Office Box 1701, San Antonio, Texas, and by mailing a copy to The Solicitor General, Department of Justice, Washington, D. C., with air mail postage prepaid.

Douglas W. McGregor

DOUGLAS W. MCGREGOR
Attorney for Petitioner
2331 Gulf Building
Houston 2, Texas

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892344—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 180

FRED M. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–23) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1956 (Pet. 24) and a petition for rehearing was denied on May 22, 1956. The petition for a writ of certiorari was filed on June 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, as a condition precedent to use of the net worth method of proof in a prosecution for wilful at-

tempted evasion of income taxes, the Government must show a determination of the exact amount of the defendant's civil income tax liability by the Commissioner of Internal Revenue.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 27, 1952, petitioner was indicted in the United States District Court for the Western District of Texas on three counts of wilful attempted evasion of individual income taxes for the years 1945 through 1947, in violation of Section 145 (b) of the Internal Revenue Code of 1939. After a jury trial petitioner was

convicted, but the Court of Appeals reversed for errors in the admission and exclusion of evidence. *Ford* v. *United States*, 210 F. 2d 313 (C. A. 5th). After a second jury trial, lasting approximately five days, petitioner was again convicted on all counts. (R. 586.) On June 28, 1955, he was given a general sentence of four years' imprisonment. (R. 587, 609.) The Court of Appeals affirmed. (Pet. 14–23.)

The Government's evidence showed that petitioner was employed by the Galveston Police Department from 1925 until 1947, when he was fired as chief of police; that his reported income for the prosecution years totalled $8,807.10; that his correct income, computed by the net worth-expenditures method, was $42,863.91; that he dealt entirely in currency; and that in addition to his reported income (which consisted entirely of his salary as chief of police) petitioner had income from gambling and from protection payments from the operator of a house of prostitution. The defense consisted of the testimony of two character witnesses. (R. 29, 34, 39, 369–370, 387–388, 409–439, 552–568.)

ARGUMENT

Petitioner's sole contention—that in a criminal prosecution for income tax evasion based on the net worth-expenditures method the Government must put into evidence a determination of the defendant's civil tax liability by the Commissioner of Internal Revenue—is patently insubstantial. The point does not appear to have been raised since the earliest days of income tax evasion prosecutions, when it was found to be without merit in *Guzik* v. *United States*, 54 F.

2d 618, 619 (C. A. 7th), certiorari denied, 285 U. S. 545 and *Commerford* v. *United States*, 64 F. 2d 28, 30 (C. A. 2d), certiorari denied, 289 U. S. 759.[1] The contention apparently grew out of certain language used in *Capone* v. *United States*, 51 F. 2d 609, 619 (C. A. 7th), certiorari denied, 284 U. S. 669, and now relied upon by petitioner. (Pet. 6–7.) In that case, however, the court was dealing with Capone's contention that the Government had not proved a count alleging that he had wilfully refused to pay certain taxes which had actually been assessed against him by the Commissioner. The language relied on has nothing to do with the crime of attempting to evade income taxes, which is complete when the taxpayer wilfully and knowingly files a false return with intent to defeat or evade a substantial part of the tax due. *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, 869 (C. A. 7th) and cases cited; *Guzik* v. *United States, supra.* The statutory provisions relied upon by petitioner (Pet. 11–12—Sections 272 (a) (1), 3612 (a) and 3612 (f) of the Internal Revenue Code of 1939) plainly concern only the civil aspects of tax assessment and collection, and petitioner's argument arises from a confusion of the civil and criminal aspects of the revenue laws. Civil tax cases are disputes between the taxpayer and the Commissioner. The question is the *exact* amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's determination is erroneous. In criminal cases, however, the burden of proof is

[1] These were not net worth cases, though *Guzik* was based mainly on bank deposits.

on the Government, but the Government need only prove that the defendant fraudulently evaded *some* of his income taxes; it does "not have to prove the exact amounts of unreported income." *United States* v. *Johnson,* 319 U. S. 503, 517.[2] In any event, the Government could not, even if it would, put into evidence the Commissioner's determination because it would be irrelevant to the issues in the criminal case and incompetent as hearsay.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

JULY 1956.

[2] This Court has recognized that the net worth proof is required to establish only a reasonable approximation of the amount of unreported income. *Holland* v. *United States*, 348 U. S. 121, 129, 135. Cf. also, *Goldbaum* v. *United States*, 204 F. 2d 74, 78 (C. A. 9th), certiorari denied: 346 U. S. 831; *Leeby* v. *United States*, 192 F. 2d 331, 334 (C. A. 8th); *Goodelman* v. *United States*, 191 F. 2d 993, 996 (C. A. 9th), certiorari denied, 342 U. S. 909; *United States* v. *Schenck*, 126 F. 2d 702, 704 (C. A. 2d), certiorari denied *sub nom Moskowitz* v. *United States*, 316 U. S. 705; *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C. A. 7th), certiorari denied, 301 U. S. 689; *Gleckman* v. *United States*, 80 F. 2d 394, 399–401 (C. A. 8th), certiorari denied, 297 U. S. 709.

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